CLAIMS OF MIYO IZUMI AND SADAKO IZUMI

[Nos. 146–35–4630 and 4736. Decided October 7, 1955]

FINDINGS OF FACT

These two claims, in the total amount of $7,084, were received by the Attorney General in June 1949. The claims are identical in character, claimants being sisters and each claiming one-half of the total loss alleged. Claimants, persons of Japanese ancestry actually resident in the United States on and since December 7, 1941, were evacuated from Tulare, California, on May 13, 1942, under military orders pursuant to Executive Order No. 9066. At the time of their evacuation, claimants were joint owners of two parcels of realty, one of which was located in the City of Corcoran, California, and the other in the City of Tulare, California. Claimants allege as a loss the difference between the rent received from said property during the period of their exclusion and the fair rental value of the premises. It having been determined that such difference does not constitute a loss within the meaning of the Act, the claims were summarily dismissed with the provision that the dismissals should be set aside in the event claimants requested a hearing. Claimants having made such request, the dismissals were vacated and hearing on the claims duly had.

Examination of the record discloses the basis for the claim of loss with respect to the Tulare property to be solely that due to their evacuation, claimants were forced to lease the premises for a 10-year term at $85 per month, whereas the fair rental value assertedly was $135 per month. Claimants neither allege nor show that the renting entailed abnormal expenditures which would not have been incurred but for their evacuation or exclusion and that they suffered a net loss in consequence thereof.

Moreover, the record warrants the inference, and it is accordingly found, that claimants, in actual fact, netted a profit on the transaction.

With respect to the Corcoran property, the record reveals that the premises—owned and operated for rental income—were originally rented to a Japanese tenant who was forced to vacate because of his evacuation and the claimants thereupon placed the property in the hands of a real estate broker for renting. The record further reveals that the premises thereafter remained vacant until January 1, 1945, claimants paying the taxes and continuing their customary insurance coverage during the period of such vacancy. Finally, the record reveals that from January 1, 1945, to July 31, 1947, on which date the property was sold, the premises were rented for an amount alleged by claimants to have been less than the fair rental value and that claimants expended the sum of $94 in broker's fees as an incident of such renting. On the basis of the foregoing, claimants seek recovery of the fair rental value of the premises for the period the property was vacant and, further, the difference between the rent received and the alleged fair rental value, together with reimbursement of the expenditure for broker's fees, for the period it was rented. Claimants have offered no evidence showing that the payment of the broker's fees—made after the lifting of the general Exclusion Orders—was caused by their evacuation or exclusion or that said payment resulted in a net loss on the renting. Moreover, the record warrants the inference, and it is accordingly found, that claimants netted a profit on the transaction despite such payment.

At the hearing, held subsequent to the bar date, claimants requested leave to amend their claim with respect to the Corcoran property so as to include as items of loss, by way of alternative claim, the sums expended for taxes and insurance during the period the premises were vacant.

REASONS FOR DECISION

The respective claims for the difference between the rent received for the two premises and their alleged fair rental value and for reimbursement of broker's fees cannot be recognized since they are for loss of anticipated profits and therefore barred by Section 2 (b) (5) of the Statute. *Toshiko Usui, ante,* p. 112. Likewise barred by Section 2 (b) (5) of the Statute, because it is for loss of anticipated profits, is the claim for loss of rental income from the Corcoran property during the period the latter was vacant. *Idem.* Claimants' request to amend so as to include as items of loss the tax and insurance payments on the Corcoran property during the period of vacancy may properly be granted. *Kiyoji Murai, ante,* p. 45; *Roy Furuya, ante,* p. 288.

Claimants' amendment being allowable, there is presented for determination the question as to whether payments for taxes and insurance on unrented realty are reimbursable. That the question must be answered in the negative would appear to be clear. Section 1 of the Statute specifically provides that to establish a right to recovery, a claimant must show property damage or loss that is a reasonable and natural consequence of his evacuation or exclusion. That the instant claimants fail to satisfy this requirement is apparent from the fact that the outlays involved represent merely normal incidents of the ownership of realty and have no relation whatsoever to claimants' evacuation or exclusion. Thus, the tax payments represent fulfillment of an obligation imposed by law and borne alike by all owners of realty in the area regardless of their presence or absence from the locality. Again, insofar as appears from the record, the insurance payment was for coverage in the amount customarily carried by claimants, no extra expenditure for additional protection necessitated by their exclusion being involved.

In a brief submitted by the Japanese American Citizens League as *amicus curiae,* however, the subject tax and

insurance payments are contended to be reimbursable. The basis of the contention is two-fold. The League maintains, first, that since the subject payments were made to protect the property and prevent its loss, they necessarily represent expenditures for preserving property within the meaning of the Statute. Secondly, the League contends that disallowance of the items creates an inequity as between vacant property and property rented for less than its fair rental value since in the latter situation the owner assertedly may include his tax and insurance payments among the items of expense to be set-off against income for the purpose of showing a deficiency as between income and expense and establishing a compensable net loss on the rental transaction.

The untenability of the League's contention is readily demonstrated. That claimants' tax and insurance payments do not constitute expenditures for preserving property within the meaning of the Statute is plain from the matters previously indicated. As already seen, Section 1 of the Statute makes the existence of a causal connection between evacuation or exclusion and loss indispensable to statutory recognition. As likewise seen, the subject payments fail to meet this requirement because of the absence of such connection. Unlike such matters, for example, as storage charges or interest payments on life insurance premium loans—abnormal expenditures specially incurred as a direct consequence of evacuation or exclusion—claimants' tax and insurance payments were not caused by their evacuation or exclusion but were normal operating costs. It is true, of course, that if, as a result of their evacuation, claimants had lacked funds with which to pay the taxes and, as a consequence, had lost the property, the loss would probably be compensable. The latter situation is distinguishable from that here involved, however, since the loss would be directly attributable to claimants' evacuation and the causal connection prescribed by the Statute would therefore exist. So, too, if claimants had been forced by their evacuation or exclu-

sion to take out insurance for the first time or to obtain extra coverage because of added risk resulting from their absence. Here, again, the statutory requirement would be met since an abnormal expenditure directly traceable to evacuation or exclusion would be shown.

As for the claim that disallowance of the subject payments creates an inequity between vacant property and property rented for less than its fair rental value, it would appear that the *amicus curiae* misconceives the nature of the recovery permitted in the latter situation. It is undoubtedly true that if claimants had rented the property for less than its fair rental value and the question arose as to whether they had a net loss due to their exclusion, the tax and insurance payments could properly be included among the items of expense to be deducted from the amount received in order to determine their net position. This would not mean, however, that claimants could receive compensation for any deficiency shown between income and normal operating expense. While such deficiency would represent out-of-pocket expense, it is settled that mere depletion of savings due to normal expenditures during a period of diminished income does not constitute a compensable loss (*Torao Nakamura, ante,* p. 277; *Mary Sogawa, ante,* p. 126) any more than does deprivation of such income itself, which was frequently a consequence of claimants' exclusion from the places where they had gainfully employed their talents prior to their evacuation. *See Takeshi Sakurai, ante,* p. 346.

On the other hand, all other cases involving rental claims, of which we are aware, concern situations in which compensation might be paid if claimants had sustained net losses, so it is understandable that the *amicus curiae* associates compensability with the net loss sustained in the instant case. Thus, in the case of *Toshiko Usui, supra,* the claim based on a fee paid to a real estate broker was "disallowed inasmuch as same must be considered as an operating cost and deducted from the gross income derived" even though this might have been regarded as a

compensable conservation cost but for the proscription of Section 2 (b) (5). Again, in the case of *George E. Suzuki, ante,* p. 363, the suggestion was prominent that, if the total of the amounts received had been insufficient to pay all expenses and to restore the property to the condition in which it would have been found if it had not been leased, the difference might have been made up in the award. Unlike the instant case, however, that claim involved items of physical damage to the property and expenses specially incurred on account of claimant's evacuation and exclusion. Cf. *Alice Suyehiro, ante,* p. 298.

In no case has it been held that a mere net loss on a business venture was *ipso facto* compensable under the Act even though the possibility existed that the earnings might have been larger if claimant's exclusion had not prevented his normal participation in the enterprise. Rather, it must appear in some concrete way that property (which might consist of an entire business as a going concern) was actually lost or damaged due to his enforced absence. The expense, for example, of employing an agent or manager to take claimant's place might, in some circumstances, constitute a compensable conservation cost if and to the extent that payment of this expense resulted in a net loss on the operation of the business or enterprise as a whole. Cf. *Haruko Itow, ante,* p. 51. Such compensation, however, on these limited facts, would be for the loss of the money spent to employ the agent and not for the net operating loss that such expenditure produced. The latter element would be of importance only in rendering inapplicable the anti-profits proscription of Section 2 (b) (5) of the Act.

In the instant case the expenses of taxes and insurance were normal and, unlike the cases in which unusual expenses were incurred as a result of claimants' enforced absence, would have been paid regardless of claimants' evacuation. Since they are not within the beneficial coverage of Section 1 of the Act, irrespective of the applicability or inapplicability of Section 2 (b) (5), the question

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of whether or not the attempt to rent the property resulted in net gain or net loss is an irrelevant consideration insofar as the instant claim is concerned.

The foregoing rather lengthly explanation of the distinction between this case and others, where net profits and losses are concerned, is not to be taken as an indication that the precise legal theory employed is of general, practical importance; for we know of no other situation in which it would be likely to produce a different result than would the theory advocated by the *amicus curiae*. It is of great importance, however, that conceptual thinking based on earlier adjudications should not so blind us to the requirements of the Statute as to produce unauthorized results. Here all that was lost due to claimants' enforced absence was the opportunity that they would have had personally to try to make the property more productive of earnings. Whether they or any one else could have done so is a question that no one can confidently answer. Certainly, this was not a loss of property within the intended, beneficial coverage of the Act and no play on words or ideas previously expressed by us could justify administrative enlargement of that coverage.

No part thereof being compensable, the claims must necessarily be dismissed.